

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

GEORGE H.,

Plaintiff,

v.

Civil Action No.
8:23-CV-433 (DEP)

MARTIN J. O'MALLEY,
Commissioner of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

SCHNEIDER & PALCSIK
57 Court Street
Plattsburgh, NY 12901

MARK SCHNEIDER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

FERGUS KAISER, ESQ.

¹ Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.² Oral argument was conducted in connection with those motions on August 14, 2024, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

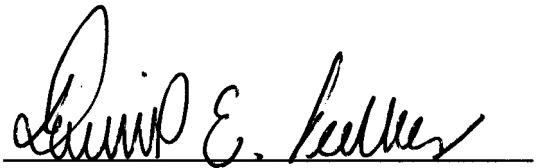
After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

² This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, with a directed finding of disability and for the purpose of calculating benefits owing to the plaintiff.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: August 22, 2024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
GEORGE H.,

Plaintiff,

-v-

8:23-CV-433

KILOLO KIJAKAZI, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.
-----x

**DECISION TRANSCRIPT
BEFORE THE HONORABLE DAVID E. PEEBLES**

August 14, 2024
100 South Clinton Street, Syracuse, NY 13261

For the Plaintiff:

SCHNEIDER & PALCSIK
57 Court Street
Plattsburgh, New York 12901
BY: **MARK A. SCHNEIDER, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION
26 Federal Plaza
Room 3904
New York, New York 10278
BY: **FERGUS J. KAISER, ESQ.**

*Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8545*

1 (The Court and all parties present by telephone.
2 Time noted: 11:16 a.m.)

3 THE COURT: All right. Let me begin by thanking
4 counsel for their presentations.

5 I have before me a challenge to an adverse
6 determination by the Commissioner of Social Security. It is
7 brought pursuant to 42, United States Code, Section 405(g).

8 At the outset of argument, we confirmed that
9 plaintiff's counsel consents on behalf of his client to my
10 hearing and deciding this case.

11 The background is as follows: Plaintiff was born in
12 August of 1968 and is currently 55 years of age. He was
13 51 years old at the alleged onset of disability on October 1,
14 2019. He stands approximately 5'8" in height and weighs roughly
15 120 pounds. Plaintiff is married and lives with his wife in
16 Schuyler Falls in a two-story home. Each of he and his spouse
17 have an adult child. Plaintiff drives. Plaintiff has a 12th
18 grade high school education and attended briefly a community
19 college. While in school, he was in regular classes.

20 Physically, plaintiff suffers from chronic
21 obstructive pulmonary disease or COPD, emphysema, lumbar and
22 cervical degenerative disc disease, hypertension, and left
23 shoulder pain. He was on Oxycodone, but now addresses his pain
24 with just Tylenol. He does not use any assistive devices.

25 Mentally, plaintiff suffers from depression, anxiety,

1 an adjustment disorder, and posttraumatic stress disorder.
2 However, he has not been psychiatrically hospitalized and has
3 not had any specialized mental health treatment. He does
4 testify to suffering and experiencing anxiety around crowds.

5 Plaintiff worked until October 1, 2019. According to
6 the record, he lost his position when his employer moved out of
7 state. That's at page 622 of the Administrative Transcript.
8 While working, he was a laborer and worked in a warehouse in
9 distribution and shipping, as well as a manager and supervisor.
10 He also worked for two weeks in 2019 as a dairy stocker.

11 Plaintiff's activities of daily living include some
12 cooking. He can shower. He can dress. He walks and feeds his
13 dogs. He watches television and listens to the radio. He mows
14 his lawn when able using a ride-on lawnmower. He does some
15 shopping. He watches video games. He used to hunt and fish,
16 but he stated he's going to try to focus on fishing and not
17 hunting.

18 Plaintiff has smoked off and on. He currently smokes
19 three to six cigarettes a day. He quit apparently in October of
20 2020, that's at 411, but restarted in April of 2021, that's at
21 page 489, and currently, as I said, smokes three to six
22 cigarettes a day, that's at page 601 of the Administrative
23 Transcript.

24 Procedurally, plaintiff applied for Title II benefits
25 on April 19, 2021. He made a prior application for benefits on

1 April 17, 2020. That was denied after a hearing before
2 Administrative Law Judge Mary Sparks. The Social Security
3 Administration Appeals Council denied review on March 22, 2021.
4 In this case, he alleged an onset date of October 1, 2019, and
5 at 312 of the Administrative Transcript claimed disability based
6 on lower back pain, neck pain, bulging discs in his lower back,
7 depression, high blood pressure, COPD, and lung disease.

8 A hearing was conducted on March 17, 2022, with a
9 vocational expert by Administrative Law Judge Asad Ba-Yunus.
10 That Administrative Law Judge issued an unfavorable decision on
11 April 4, 2022. That became a final determination of the agency
12 on March 23, 2023, when the Social Security Administration
13 Appeals Council denied plaintiff's application for review. This
14 action was commenced on April 6, 2023, and is timely.

15 In the decision, Administrative Law Judge Ba-Yunus
16 applied the familiar five step sequential test for determining
17 disability, first noting that plaintiff's last insured status
18 date was March 31, 2024.

19 At step one, the Administrative Law Judge concluded
20 that plaintiff had not engaged in substantial gainful activity
21 since the alleged onset date, viewing the short-term employment
22 at Wal-Mart as an unsuccessful work attempt in 2019.

23 At step two, the Administrative Law Judge concluded
24 that plaintiff does suffer from impairments that impose more
25 than minimal limitations on his ability to perform work

1 functions, including cervical and lumbar degenerative disc
2 disease and COPD.

3 At step three, the Administrative Law Judge concluded
4 that plaintiff's conditions do not meet or equal any of the
5 listed presumptively disabling conditions set forth in the
6 Commissioner's regulations.

7 The Administrative Law Judge then went on to conclude
8 that despite his impairments, plaintiff retains the residual
9 functional capacity or RFC to perform light work, except that
10 the claimant can no more than occasionally climb ladders, ropes,
11 scaffolds, ramps, stairs, balance, stoop, crouch, kneel, crawl,
12 and would need to avoid all exposure to irritants such as fumes,
13 odors, dust, gases, and poorly ventilated areas.

14 Proceeding to step four, the Administrative Law Judge
15 concluded that notwithstanding his limitations, plaintiff is
16 capable of performing his past relevant work, which was
17 characterized as a shipping manager as it was actually performed
18 even though under the Dictionary of Occupational Titles as
19 regularly performed in the national economy it is characterized
20 as medium.

21 Alternatively, at step five, the Administrative Law
22 Judge concluded with the benefit of testimony from a vocational
23 expert that notwithstanding his limitations, plaintiff could
24 perform available work in the national economy citing as
25 representative positions those of cashier, package sorter, and

1 mail clerk and, thus, concluded that plaintiff was not disabled
2 at the relevant times.

3 As the parties know, the Court's function is
4 extremely limited in this case to determining whether correct
5 legal principles were applied and the resulting determination is
6 supported by substantial evidence, which is defined as such
7 relevant evidence as a reasonable person would find sufficient
8 to support a conclusion. The Second Circuit has noted on
9 multiple occasions, most prominently in *Brault v. Social*
10 *Security Administration Commissioner*, 683 F.3d 443 from 2012,
11 that this is an extremely deferential standard, more stringent
12 than the clear and convincing standard that the lawyers are
13 familiar with. That standard was reiterated more recently in
14 *Schillo v. Kijakazi*, 31 F.4th 64, from the Second Circuit, April
15 of 2022.

16 The plaintiff's contentions in this case are
17 multiple. As is typical, Attorney Schneider has covered the
18 waterfront and raised very interesting issues. He alleges
19 errors in the evaluation of medical opinions, he challenges the
20 step five determination, and points out that if plaintiff was
21 restricted to sedentary work, a finding of disability would be
22 directed by the Medical-Vocational Guidelines or Grids. He
23 claims error in the Administrative Law Judge's evaluation of
24 plaintiff's subjective reports of symptomology and he argues
25 that the step two determination should have included both mental

1 impairments and atherosclerosis, which I understand, though I
2 can't pronounce it, that it is the narrowing or hardening of
3 arteries.

4 The first argument is the step two argument -- and by
5 the way, the plaintiff's counsel has raised the prospect that
6 this Administrative Law Judge has been reversed on a number of
7 occasions. I take cases as I see them case-by-case and I don't
8 draw any adverse conclusions by that fact.

9 In terms of step two, obviously, a claimant must show
10 that he or she has a medically determinable impairment that
11 rises to the level of a severe impairment. An impairment fails
12 to reach the threshold of severity where it does not
13 significantly limit the claimant's physical or mental ability to
14 do basic work activities. It's well established that the step
15 two requirement is de minimus, intended only to screen out the
16 truly weakest of cases, but it is also well accepted that the
17 mere presence of a disease or impairment, or establishing that a
18 person has been diagnosed or treated for a disease in and of
19 itself is not sufficient to render a condition severe.

20 In this case, there was a claim that a mental
21 limitation should have been included and found severe at step
22 two. The Administrative Law Judge did discuss plaintiff's
23 mental health conditions at pages 16 to 17. I do know that
24 there was a typographical error on page 17 when the
25 Administrative Law Judge cited Exhibit B3F. I think it should

1 have been B3E. But he applied the special psychiatric
2 technique, found no limitations in any of the four functional
3 areas covered by the so-called B criteria, explained the
4 reasoning, which included plaintiff's activities of daily
5 living, no psychiatric hospitalization, no mental health
6 treatment, often denied any psychiatric symptoms to treatment
7 providers, often demonstrated normal mood and affect. He
8 reviewed the findings of the consultative examiner, Dr. Brett
9 Hartman, which the opinion from Dr. Hartman was properly
10 rejected in part at page 22 of the Administrative Law Judge's
11 decision. I don't find any error in failing to include a mental
12 health condition as severe at step two. And, of course, cases
13 are well uniform in saying that there's harmless error if there
14 is a failure to include a condition at step two if the
15 sequential evaluation proceeds to step three and all
16 impairments, severe and nonsevere, are included and considered
17 in formulating the RFC.

18 In terms of the atherosclerosis, which, again, I
19 cannot pronounce, I note that plaintiff did not claim this as a
20 basis for disability. That's at 312. The plaintiff cites
21 X-rays showing a modest condition, but critical is whether there
22 are any resulting limitations. It is plaintiff's burden through
23 step four, obviously, to establish limitations stemming from any
24 claimed medically determinable impairment. I reviewed carefully
25 both the hearing testimony and the record and didn't find the

1 presentation of any evidence showing a limitation stemming from
2 this particular condition, so I find no error in that regard.

3 Turning next to formulation of the RFC and evaluation
4 of medical opinions. Obviously, pivotal to a determination of
5 disability is a claimant's RFC, which represents a finding of
6 the range of tasks the claimant is capable of performing
7 notwithstanding his or her impairments, and that means a
8 claimant's maximum ability to perform sustained work activities
9 in an ordinary setting on a regular and continuing basis,
10 meaning eight hours a day for five days a week or an equivalent
11 schedule. An RFC is informed by consideration of claimant's
12 physical and mental abilities, symptomology, and other
13 limitations that could interfere with work activities on a
14 regular and continuing basis, as well as all relevant medical
15 and other evidence.

16 In this case, I read into the record the residual
17 functional capacity finding of the Administrative Law Judge,
18 which includes, among other things, light work. Light work is
19 defined under 20 C.F.R. Section 404.1567(b), as well as Social
20 Security Ruling 83-10. Significantly, in this case, light work
21 requires intermittently standing or walking for a total of
22 approximately six hours of an eight-hour workday.

23 The medical opinions in this record include four --
24 for the evaluation of medical opinions since March 27th -- well,
25 cases filed after March 27, 2017, I should say, are subject to

1 amended regulations under which the Commissioner no longer
2 defers or gives any specific evidentiary weight, including
3 controlling weight, to any medical opinions, but, rather, must
4 consider whether those opinions are persuasive by primarily
5 considering whether the opinions are supported by and consistent
6 with the record in the case, 20 C.F.R. Section 404.1520(c).

7 There are two prior administrative medical findings
8 which qualifies medical opinions in the record. The first is
9 from Dr. -- that addressed plaintiff's physical condition, I
10 should say. First is from Dr. Seok from July 12, 2021. It
11 appears at 92 through 112 of the record. Significantly, Dr.
12 Seok opines that plaintiff can stand and/or walk for only two
13 hours in an eight-hour workday, that's in 101, and can only lift
14 and carry ten pounds occasionally, but less than ten pounds
15 frequently, and cannot perform plaintiff's past relevant work.
16 That's at 110 of the Administrative Transcript.

17 The second is from Dr. R. Mohanty from November 4,
18 2021. It appears at 114 to 136. It echoes Dr. Seok's findings,
19 including standing, walking, lifting, and performance of past
20 relevant work.

21 The third opinion is from consultative examiner
22 Dr. Susan Dantoni. It is dated June 30, 2021. It appears at
23 580 to 585 of the Administrative Transcript. In the medical
24 source statement, it indicates that plaintiff has marked
25 limitations for prolonged standing and walking, among other

1 things.

2 The substance of the report also indicates the
3 following: With regard to general appearance, gait, and
4 station, the claimant appeared to be in a lot of pain. He walks
5 with a somewhat antalgic gait. He appears to be in pain as he
6 walks. He cannot walk on heels and toes, squat ten percent,
7 stands normal, use no assistive devices, needed no help changing
8 for exam, I did have to help him on and off the exam table, he
9 had some difficulty rising from the chair.

10 In terms of the musculoskeletal exam, there was a
11 limited range of motion in the neck, severe pain when he tried
12 to move it, he had a lot of pain in his back during this part of
13 the exam, positive straight leg rise at 70 degrees confirmed in
14 the seated position, decreased range of motion in the left
15 shoulder.

16 The Administrative Law Judge concluded that that was
17 not persuasive at page 21, finding that it was somewhat
18 inconsistent with clinical observations and testing. The test
19 results, though, seem not to necessarily undercut it. At page
20 607, the report of a lumbar spine X-ray showed L5 pars defects,
21 grade 2 anterolisthesis L5 on S1. Degenerative changes, most
22 pronounced in the lower lumbar spine. That's at page 607.

23 At page 608, the impression is interval development
24 of moderate degenerative disc disease at C6-7, as well as
25 degenerative facet joint disease at C5-6 and C6-7. This relates

1 to X-ray of, obviously, the cervical spine.

2 At 610, there is also a report of an X-ray of the
3 lumbar spine, L5 pars defects. Grade 2 anterolisthesis L5 on
4 S1. Degenerative changes, most pronounced in the lower lumbar
5 spine.

6 And at 611, a similar observation to the earlier one
7 with regard to the cervical spine.

8 The last medical opinion in the record is from the
9 pulmonologist treating the plaintiff, Dr. Sadaf Mir from
10 June 29, 2021. That's at 590 to 593. The opinion of Dr. Mir is
11 that plaintiff cannot meet the lift requirements of light work.
12 He does not offer an opinion as to whether plaintiff can stand
13 and/or walk six hours in an eight-hour workday, deferring to the
14 primary provider.

15 The Administrative Law Judge used plaintiff's
16 activities of daily living, among other things, to undercut
17 these uniform medical opinions, shopping one hour per week
18 weekly, one hour weekly at a time, no explanation of how the ALJ
19 concluded plaintiff can meet the requirements of standing and
20 walking and lifting and carrying of light work.

21 I think that the Administrative Law Judge played
22 doctor and reviewed clinical evidence and came to his own
23 conclusion, which is inconsistent with four uniform opinions of
24 record by medical professionals.

25 I find that there was error in concluding that

1 plaintiff can perform the requirements of light work. The
2 question is, is it harmless or harmful. As plaintiff argues,
3 and as I think the Commissioner's counsel conceded, if plaintiff
4 was capable only of performing sedentary work, a finding of
5 disabled would be compelled by Grid Rules 201.12 and 201.14
6 since he is approaching the advanced age category and was at the
7 onset.

8 The shipping manager supervisor position is skilled,
9 the warehouse manager position is skilled, the vocational expert
10 when presented with a sedentary hypothetical stated that
11 plaintiff is not capable of performing his past relevant work
12 and does not possess any transferable skills, so the step four
13 and step five findings, in my view, are infected by the error in
14 formulating the residual functional capacity. I agree with
15 plaintiff's counsel that the evidence in this case is persuasive
16 on the question of disability and no useful purpose would be
17 served in returning this case for further review.

18 So I will grant plaintiff's motion for a judgment on
19 the pleadings, vacating the Commissioner's determination, and
20 remanding the matter to the Commissioner solely for the purpose
21 of calculation of benefits, and with a directed finding of
22 disability.

23 Thank you, both, for your excellent presentations and
24 I hope you enjoy the rest of your summer.

25 MR. KAISER: Thank you, your Honor.

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THE COURTROOM DEPUTY: Court is adjourned.

(Time noted: 11:41 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 19th day of August, 2024.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR
Official U.S. Court Reporter